UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARIA DE LA O; SILVIA FARIAS; BARBARA BRAVO; ADELINA RAMIREZ; CELIA CARO; MAYOLA MADRIGAL; ROSA GUERRERO; IRENE NEGRETE; IRMA CONTRERAS; ALEJANDRA PEREZ; ELIZABETH RAMIREZ; MARIA DE FAVELA; MARIA DEL CARMEN HERNANDEZ; MARGARITA MATA; ALICIA MEDRANO; VERONICA NEVAREZ; MARIA PUENTES; ALICIA RODRIGUEZ; MARIA RUIZ; GUADALUPA SALAS; and JUANA SANCHEZ,

Plaintiffs,

v.

ROBIN ARNOLD-WILLIAMS, Secretary, Department of Social and Health Services, in her official capacity; JOHN BUMFORD and MICHAEL COYNE, in their official and individual capacities; and JUDY ESSER, ROBIN CLAWSON, ISRAEL VARGAS, JAMES DITZEL, DICK HOEZEE, KRIS BONESS, DON SMITH, RANDALL BLACKBURN, STEVE JENSEN, and JANE DOES 1-5 and JOHN DOES 1-5, in their individual capacities; and TOWN OF MATTAWA, WASHINGTON,

Defendants.

NO. CV-04-0192-EFS

**ORDER GRANTING IN PART AND DENYING IN PART *De La O* PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT DECLARING RCW 4.24.350 UNCONSTITUTIONAL AND DISMISSING COUNTERCLAIM**

MARIA FERNANDEZ, MARIA SOLEDAD CHAVEZ, and BERTHA MENDOZA, as individuals and on behalf of all other similarly situated persons, and PRISCILLA ERAZO, SILVIA GONZALES, OLGA MERCADO, CARMELA

[NO. CV-05-0280-EFS]

RAMIREZ, ROSALINDA RAMIREZ, and ROSA MARIA REYEZ, as individuals,

Plaintiffs,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES; ROBIN ARNOLD-WILLIAMS, in her official capacity; KENNITH HARDEN and JOHN BUMFORD, in their official and individual capacity; ROBIN CLAWSON, MICHAEL COYNE, JAMES DITZEL, ISRAEL VARGAS, DICK HOEZEE, KRIS BONESS, DON SMITH, JUDY ESSER, RANDALL BLACKBURN, STEVE JENSEN, JANE DOES 1-5, and JOHN DOES 1-5, in their individual capacities; and TOWN OF MATTAWA, Washington,

Defendants.

A hearing was held in the above-captioned matters on February 28, 2006. Plaintiffs in *De La O* were represented by C. Joshua Alex and Katrin Frank, while Joachim Morrison appeared on behalf of the *Fernandez* Plaintiffs. John McIlhenny appeared on behalf of Defendants State of Washington and state agents ("the State Defendants"), and Jerry Moberg represented Defendants Mattawa and Grant County and agents.[1] Before the Court was *De La O* Plaintiffs' Motion for Partial Summary Judgment Declaring RCW 4.24.350 Unconstitutional and Dismissing Counterclaim (Ct. Rec. 54), which was joined by *Fernandez* Plaintiffs. After reviewing the

[1] Following the hearing on this motion, the parties stipulated to the dismissal of Grant County, Washington; David Matney; and Grant County Jane Does and John Does. (Ct. Rec. 108.) The case captions have been amended to reflect these dismissals.

submitted materials and applicable law and hearing oral argument, the Court is fully informed; the Court grants in part and denies in part Plaintiffs' motion, declaring Revised Code of Washington ("RCW") 4.24.350(1) unconstitutional but allowing a revised counterclaim and denying the request for damages and fees.

**A. Background**

Defendants Esser, Blackburn, Jensen, Town of Mattawa, and Grant County (hereinafter "Mattawa and Grant County Defendants") have asserted the following counterclaim:

> Plaintiffs' claims against these Defendants are frivolous, false, unfounded and malicious. These Defendants claim the protections and rights of action granted by RCW 4.24.350, and that the Plaintiffs have abused the civil process by knowingly and maliciously instituting claims in this action, which are both false and unfounded. Defendants are entitled to their fees and costs pursuant to RCW 4.24.350. Individual Defendants are entitled to liquidated damages pursuant to RCW 4.24.350.

(Ct. Rec. 39 at 42.) Plaintiffs in *De La O*, joined by *Fernandez* Plaintiffs, ask the Court to declare RCW 4.24.350(2) as violative of the First Amendment and to dismiss the Grant County and Mattawa Defendants' counterclaim under that statute, while awarding Plaintiffs each $1 in nominal damages and their attorneys fees and costs relative to this claim under 42 U.S.C. § 1988. The State Defendants and the Mattawa and Grant County Defendants each filed an opposition, contending RCW 4.24.350 is constitutional and damages under 42 U.S.C. §§ 1983 and 1988 are inappropriate.

**B. Standing**

At the hearing, the State Defendants argued the Court need not address the constitutionality of RCW 4.24.350(2) because Plaintiffs failed to show that state action was involved. Although the Court below

finds that state action was involved, the Court also finds the issue of state action is largely irrelevant to the determination of whether the Court should consider the constitutionality of RCW 4.24.350(2).

The Mattawa and Grant County Defendants specifically asserted a counterclaim under RCW 4.24.350. Accordingly, Plaintiffs have been personally threatened with an injury as a result of Defendants' conduct of asserting this putatively illegal counterclaim. *See Jones v. City of Los Angeles*, 444 F.3d 1118, 1126-27(9th Cir. 2006). Regardless, facial constitutional challenges to a statute are generally permitted when the challenged statute is "directed narrowly and specifically at expression or conduct commonly associated with expression." *Roulette v. City of Seattle*, 97 F.3d 300 (9th Cir. 1996) (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 760 (1988)). As explained below, the Court finds RCW 4.24.350(2) is directed at restricting lawsuits – a form of expression – against specific government officials. For these reasons, the constitutionality of RCW 4.24.350(2) is properly before the Court.

**C. Constitutionality of RCW 4.24.350(2)**

Plaintiffs argue RCW 4.24.350(2) constitutes unconstitutional viewpoint discrimination because it singles out and penalizes lawsuits that allege misconduct by certain government officials. Plaintiffs maintain the Ninth Circuit's decision in *Chaker v. Crogan*, 428 F.3d 1215 (9th Cir. 2005), is on point, while Defendants contend *Chaker* is not because it addressed a criminal penal statute. Defendants also maintain RCW 4.24.350(2) does not discriminate on the basis of viewpoint, but rather simply provides a remedy to the specified government agents.

> RCW 4.24.350 provides, in pertinent part:
>
> (1) In any action for damages whether based on tort or contract or otherwise, a claim or counterclaim for damages may be litigated in the principal action for malicious prosecution on the ground that the action was instituted with knowledge that the same was false, and unfounded, malicious and without probable cause in the filing of such action, or that the same was filed as a part of a conspiracy to misuse judicial process by filing an action known to be false and unfounded.
> (2) In any action, claim, or counterclaim brought by a judicial officer, prosecuting authority, or law enforcement officer for malicious prosecution arising out of the performance or purported performance of the public duty of such officer, an arrest or seizure of property need not be an element of the claim, nor do special damages need to be proved. A judicial officer, prosecuting authority, or law enforcement officer prevailing in such an action may be allowed an amount up to one thousand dollars as liquidated damages, together with a reasonable attorneys' fee, and other costs of suit. A government entity which has provided legal services to the prevailing judicial officer, prosecuting authority, or law enforcement officer has reimbursement rights to any award for reasonable attorneys' fees and other costs, but shall have no such rights to any liquidated damages allowed.

(emphasis added). Plaintiffs are only challenging the constitutionality of subsection (2), and as the party challenging the statute, Plaintiffs have the burden of demonstrating RCW 4.24.350(2) is unconstitutional. *See Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 198 (2001). As explained below, the Court finds Plaintiffs have satisfied their burden of establishing impermissible viewpoint discrimination.

1. Applicability of *Chaker*

Defendants contend *Chaker v. Crogan*, 428 F.3d 1215 (9th Cir. 2005), is not applicable because the statute at issue was materially different given that it created a new misdemeanor penalty; whereas, RCW 4.24.350(2) is simply a remedial statute. However, under First Amendment jurisprudence, whether a restriction on speech imposes civil liability or a criminal penalty "it must satisfy relevant constitutional

standards." *Garrison v. Louisiana*, 379 U.S. 64, 67 n.3 (1964). Therefore, if the Court finds RCW 4.24.350(2) is not simply a remedial statute but places a civil sanction on speech, *Chaker*'s analysis of relevant constitutional standards is applicable.

2. Subsection (2) Impermissibly Singles Out A Type of Civil Complaint

Plaintiffs argue subsection (2) impermissibly singles out one type of complaint, those against a judicial officer, prosecuting authority, or law enforcement officer (hereinafter, "protected government agents"), for special adverse treatment in violation of the First Amendment by (1) removing elements from the common law malicious prosecution cause of action, thereby exposing the risk that a person who files a lawsuit against a protected government agent will be found to have committed malicious prosecution, (2) subjecting plaintiffs who file complaints of misconduct against the protected government agents to a potential penalty of $1,000 in liquidated damages, and (3) subjecting these plaintiffs to potentially paying the protected government officials' reasonable attorneys' fees and costs. In response, Defendants argue subsection (2) is constitutional because it did not create a new cause of action as the legislature was aware when it enacted subsection (2) that a common law malicious prosecution claim exists and subsection (2) is simply a remedy-oriented amendment to the original statute (subsection (1)).

As civil lawsuits are a form of expression, a restriction on the ability to bring suit against the government to redress a grievance is reviewed under the First Amendment. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-12 (1972); *BE & K Constr. v. Nat'l Labor*

*Relations Bd.*, 536 U.S. 516, 525 (2002). The First Amendment generally prohibits the government from proscribing speech because of disapproval of the ideas expressed. *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 383 (1992). The free speech protections provided by the First Amendment are made applicable to the states by the Fourteenth Amendment. *Prete v. Bradbury*, 438 F.3d 949, 961 (9th Cir. 2006). Yet, these protections are not absolute and the government may regulate certain categories of expression consistent with the Constitution, i.e. "content discrimination." Examples of content that may be regulated are fighting words, defamation, and obscenity. *R.A.V.*, 530 U.S. at 383. Accordingly, even though content-based regulations are presumptively invalid, the Supreme Court has permitted content-based restrictions in a few limited areas because "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). However,

> these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)-not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.

*R.A.V.*, 505 U.S. at 383-84 (emphasis in original).

Case law makes clear that the Supreme Court has differentiated between content discrimination, which may be permissible, and viewpoint discrimination, which is presumed impermissible. *Rosenberger v. Rector*

*& Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995) (invalidating university regulation that denied religious organization financial support because regulation constituted viewpoint discrimination). "When the government targets not subject matter, but a particular view taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 829.

The Ninth Circuit addressed viewpoint discrimination in *Chaker v. Crogan* by analyzing the constitutionality of California Penal Code § 148.6(a)(1), which makes it a misdemeanor to "file [ ] any allegation of misconduct against any peace officer . . . knowing the allegation to be false." 428 F.3d 1215 (9th Cir. 2005). Mr. Chaker, who had been arrested by two El Cajon Police Officers, filed a claim for damages with the City of El Cajon claiming that one of the officers assaulted him during the arrest. *Id.* at 1217. Thereafter, the District Attorney's office filed a misdemeanor criminal complaint against Mr. Chaker in state court charging him with the violation of section 148.6(a)(1) by knowingly filing a false complaint of peace officer misconduct. *Id.* Mr. Chaker filed a motion to dismiss the criminal complaint on the basis that section 148.6(a)(1) was unconstitutional because it impermissibly singled out certain speech within an unprotected category of speech. *Id.* at 1218 & 1223.

The Ninth Circuit agreed. *Id.* at 1229. The Ninth Circuit ruled section 148.6 impermissibly singles out speech critical of peace officers for special criminal sanction. *Id.* The court stated:

> [t]he statute's under-inclusiveness is particularly troublesome in this case because section 148.6 is necessarily limited to criticism of government officials-peace officers. "Suspicion that viewpoint discrimination is afoot is at its zenith when

> the speech restricted is speech critical of the government," because "[c]riticism of government is at the very center of the constitutionally protected area of free discussion."

*Id.* at 1227 (citations omitted). Accordingly, the court acknowledged, "it is clear that the state may prohibit knowingly false speech made in connection with the peace officer complaint process;" nevertheless, the Ninth Circuit determined the statute regulated speech in such a way that it singled out speech based on viewpoint, i.e. filing false statements against a police officer but not false statements supporting a police officer. *Id.* at 1225-26.

Similarly, the Court finds RCW 4.24.350(2) is unconstitutional viewpoint discrimination. As at common law, RCW 4.24.350(1) requires a party asserting a civil malicious prosecution claim to allege and prove (1) the prosecution claimed to have been malicious was instituted or continued by the other party, (2) there was want of probable cause for the institution or continuation of the prosecution, (3) the proceedings were instituted or continued through malice, (4) the proceedings were terminated on the merits in favor of the party asserting malicious prosecution or were abandoned, and (5) the party claiming malicious prosecution suffered special injury or damage as a result of the prosecution through either arrest or seizure of property. *Gem Trading Co. Inc. v. Cudahy Corp.*, 92 Wash. 2d 956, 962-65 (1979); *Petrich v. McDonald*, 44 Wash. 2d 211, 220 (1954).[2] Subsection (2) to RCW 4.24.350

[2] Defendants argue the fifth element – the party claiming malicious prosecution suffered special injury or damages as a result of the prosecution through either arrest or seizure of property – is not an element but actually a requirement for damages. However, *Petrich* clearly

eliminates the last element – the "special injury as a result of an arrest/seizure element" – by stating ". . . an arrest or seizure of property need not be an element of the claim, nor do special damages need to be proved." Accordingly, the Court finds subsection (2) did create a new cause of action for the protected government officials.[3] For example, the individual who asserts a claim against the protected government agent cannot – after the protected government agent asserts a counterclaim under RCW 4.24.350(2)– then also assert a *similar* counterclaim for malicious prosecution. This is because the elements for a common law malicious prosecution claim and a claim under subsection (2) are different. In addition, the party asserting a common law malicious prosecution claim cannot seek the same remedies as a protected government agent. The imbalance created is similar to that in *Chaker*, "i.e., only individuals *critical* of peace officers are subject to liability and not those who are supportive." 428 F.3d. at 1227. Therefore, the Court finds RCW 4.24.350(2) creates a civil sanction by making it easier for the protected government official to bring a malicious prosecution action

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indicates that this is actually an element that must be proven in order to prevail on a common law malicious prosecution claim. 44 Wash. 2d at 221-22.

[3] The statute did not merely provide a "remedy" as Defendants suggest. Although, subsection (2) does allow the prevailing protected government official to receive up to $1,000 in liquidated damages, along with reasonable attorneys' fees and costs, it also removed "the special injury as a result of an arrest/seizure" element.

and by providing a prevailing protective government official with additional damages.

Defendants also raise a "secondary effects" argument. Defendants submit differential treatment is allowed because claims against police officers, judicial officers, and prosecutors had the secondary effect of inhibiting their ability to perform their public duties and exercising their discretion, as is recognized by the legislative history. The Supreme Court addressed "secondary effects" in *R.A.V.*, noting that a content based regulation may be lawful if it is justified without reference to the content of the speech. 505 U.S. at 389. The Supreme Court provided the following example of when government regulation is permissible even though it has the secondary effect of restricting speech based on content: restricting obscene live performances involving minors. *Id.* Here, the Washington Legislature was not intending to target conduct (a secondary effect of which was to affect the content of speech) when it enacted RCW 4.24.350(2) because the legislative history makes clear that the Legislature was intending to curtail the number of lawsuits – a form of speech – brought against these protected government officials.

The Court also finds RCW 4.24.350(2)'s "remedial" legislative history is not determinative of whether this statute is constitutional. When enacting subsection (2) in 1984, the Washington Legislature stated:

> The legislature finds that a growing number of unfounded lawsuits, claims, and liens are filed against law enforcement officers, prosecuting authorities, and judges, and against their property, having the purpose and effect of deterring those officers in the exercise of their discretion and inhibiting the performance of their public duties.
>
> The legislature also finds that the cost of defending against such unfounded suits, claims and liens is severely burdensome to such officers, and also to the state and the various cities

> and counties of the state. The purpose of section 2 of this 1984 act is to provide a remedy to those public officers and to the public.

RCW 4.24.350 Historical & Statutory Notes: Legislative Findings–1984 c 133. The Ninth Circuit's ruling in *Chaker v. Crogan* made clear that whether the legislature's purpose was "remedial" is not controlling on the determination of whether the statute constitutes viewpoint discrimination. 428 F.3d at 1223 & 1226-27. There, the California Legislature enacted California Penal Code § 148.6 to remedy a perceived gap created by several state court decisions that section 148.5, which makes it a misdemeanor to report a suspected felony or misdemeanor knowing the report of criminal activity to be false, did not apply to complaints of police misconduct. *Id.* at 1226-27. Nevertheless, simply because the California Legislature enacted section 148.6 to remedy a perceived gap in the law, this was insufficient to bypass First Amendment scrutiny. *Id.* Here, the Washington Legislature enacted RCW 4.24.350(2) to relieve certain government officials from the worry of unfounded lawsuits, a "remedy" if you will. However, such legislation violates the First Amendment's prohibition against viewpoint discrimination. The test as *Chaker* teaches is "'whether the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.'" *Chaker*, 428 F.3d at 1226 (citations ommitted).

Applying this test, the Court concludes RCW 4.24.350(2) modifies the elements of a malicious prosecution action and awards additional damages *only* in those case which assert false claims against specified government officials who prevail in the case. This is essentially viewpoint discrimination and, therefore, unconstitutional. *See R.A.V.*, 505 U.S.

at 383-84. By contrast, RCW 4.24.350(1) permits claims for malicious prosecution by all litigants, thereby restricting "unprotected" speech on the basis of its constitutionally proscribable content - falsity. The First Amendment permits the latter but not the former. Because the Historical and Statutory Notes for RCW 4.24.350 contains a severability clause, the Court strikes down as unconstitutional only subsection 2 thereof. Accordingly, the Defendants retain a counterclaim pursuant to RCW 4.24.350(1) only.

Plaintiffs asked for dismissal of Defendants' malicious prosecution counterclaim; however, a claim for malicious prosecution still lies in common law and RCW 4.24.350(1) allows such a claim to be asserted as a counterclaim in the instant action. Therefore, the Court will not dismiss the malicious prosecution counterclaim; rather, Defendants may now maintain a common law malicious prosecution counterclaim under RCW 4.24.350(1). Thus, the Court revises the counterclaim to read as follows:

> These Defendants claim the protections and right of action granted by RCW 4.24.350(1), and that Plaintiffs have abused the civil process by knowingly and maliciously instituting claims in this action, which are both false and unfounded.

**B. 42 U.S.C. §§ 1983 & 1988**

Plaintiffs, in anticipation of a ruling that RCW 4.24.350(2) was unconstitutional, have asserted a claim under 42 U.S.C. §§ 1983 and 1988 against the Official and Municipal Defendants for damages, costs, and fees for the deprivation of their constitutional rights. Section 1983 of the United States Code title 42 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States or

> other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, . . . .

Section 1988 provides for entry of judgment in favor of the prevailing party and the payment of damages and attorney's fees in a § 1983 lawsuit.

To state a claim under § 1983, the plaintiff must allege a violation of his constitutional rights and show the defendant's actions were taken under color of state law. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155-56 (1978); *DeGrassi v. City of Glendora*, 207 F.3d 636, 647 (9th Cir. 2000) (dictum). The determination of whether a government employee is acting under color of law depends upon the facts and circumstances of the case. *Gritchen v. Collier*, 254 F.3d 807, 813 (9th Cir. 2001). "[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). State action also occurs when private persons are "willful participants[s] in the joint activity with the State or its agents" to invoke a constitutional deprivation. *Johnson v. Knowles*, 113 F.3d 1114 (9th Cir. 1997). Here, the individual Defendants jointly filed an RCW 4.24.350(2) counterclaim with the government employers. The Court finds such constitutes action under color of state law; therefore, because of the unconstitutionality of RCW 4.24.350(2), the Court must continue addressing Plaintiffs' argument that they have claims under 42 U.S.C. §§ 1983 and 1988. Defendants counter that they are entitled to qualified immunity because they were acting in good faith.

Qualified immunity protects government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). A government official is entitled to qualified immunity if (1) the law governing the conduct was clearly established and (2) under that clearly established law, a reasonable official would have believed his conduct to be lawful. *Conn v. Gabbert*, 526 U.S. 286, 290 (1999); *Thompson v. Souza*, 111 F.3d 694, 698 (9th Cir. 1997); *Diruzza v. County of Tehama*, 206 F.3d 1304 (9th Cir. 2000). The Supreme Court has indicated a certain degree of predictability is required:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

*Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryan*, 502 U.S. 224, 229 (1991); *Know v. S.W. Airlines*, 124 F.3d 1103, 1007 (9th Cir. 1997). This law must be clearly established at the time of defendant's acts. *Conn v. Gabbert*, 526 U.S. 286, 290 (1999); *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir. 1994).

Although the Supreme Court in *R.A.V.* clearly held viewpoint discrimination is unlawful, the Court concludes a reasonable person would not have known it was unconstitutional to allege an RCW 4.24.350(2)

counterclaim. The Court recognizes that in order for the law to be clearly established there does not have to be case law directly finding that subsection (2) is unconstitutional. Yet, in light of the language in RCW 4.24.350(2)'s legislative history, the unlawfulness of alleging a malicious counterclaim under subsection (2) was not apparent under pre-existing law; therefore, a reasonable person would not understand that alleging such a malicious counterclaim violates an individual's First Amendment rights. *See Jensen v. City of Oxnard*, 145 F.3d 1078, 1085 (9th Cir. 1998). Accordingly, the Court finds Defendants were acting in good faith, entitling them to qualified immunity and thus Plaintiffs' requests for damages and fees under 42 U.S.C. §§ 1983 and 1988 are denied.

Accordingly, **IT IS HEREBY ORDERED:** *De La O* Plaintiffs' Motion for Partial Summary Judgment Declaring RCW 4.24.350 Unconstitutional and Dismissing Counterclaim **(Ct. Rec. 54)** is **GRANTED IN PART** (RCW 4.24.350(2) constitutes viewpoint discrimination in violation of the First Amendment and damage requests are stricken from the counterclaim) **and DENIED IN PART** (Defendants may proceed on a common law malicious prosecution counterclaim under RCW 4.24.350(1), and Plaintiffs are not entitled to damages under 42 U.S.C. §§ 1983 and 1988 because the agents are entitled to qualified immunity).

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**IT IS SO ORDERED.** The District Court Executive is directed to file this Order and provide copies of this Order to counsel.

**DATED** this 25th day of September 2006.

S/ Edward F. Shea
EDWARD F. SHEA
United States District Judge

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